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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 374

WM. H. WISE COMPANY, INC., THE CHARMING WOMAN, INC., JOHN J. CRAWLEY, Individually and as an officer of said corporations, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WM. H. WISE COMPANY, INC., THE CHARMING WOMAN, INC., JOHN J. CRAWLEY, Individually and as an officer of said corporations, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Wm. H. Wise Company, Inc., The Charming Woman, Inc., and John J. Crawley, individually and as an officer of said corporations, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of

Appeals for the District of Columbia Circuit, dated June 6, 1957.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported. A copy is appended as Appendix A.

The opinion of the Federal Trade Commission has not yet been reported. (R. 41).

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the District of Columbia Circuit and its judgment in favor of Respondent was made and entered June 6, 1957. No petition for rehearing was filed.

This Court has jurisdiction of the questions presented under the provisions of Title 28, U.S.C. Sec. 1254.

QUESTIONS PRESENTED

1. Should the law governing general factual situations arising under the Federal Trade Commission Act, be left in such posture that the decisions of this Court and of the United States Courts of Appeals for the Tenth, Seventh, Sixth, Fourth, Third and Second Circuits are directly in conflict with the decisions of the District of Columbia Circuit?

2. Does a collection agency have a duty to disclose to debtors any identity of ownership or control existing between the creditor and the collection agency and does a failure to do so constitute deception sufficient to satisfy the public interest requirement of Section 5 of the Federal Trade Commission Act?

3. Is the Order, directed against Petitioners and their agents, representatives and employees, directly or through any corporate or other device, lacking in specificity and definiteness and, being too broad, invalid?

STATUTES INVOLVED

The statutes directly involved are Title 15 U.S.C. Sec. 45(a)(1)(6):

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

and Title 5 U.S.C. Sec. 1006(c):

> Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. * * * No sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. * * *

STATEMENT

The Federal Trade Commission on January 7, 1955, issued its complaint, charging Petitioners with deceptive practices. Prior to formal hearings, a stipulation was entered into on all matters in the complaint excepting Paragraph Seven which reads:

> "In the course and conduct of said business as aforesaid, respondents have adopted and use a

fictitious trade name, to-wit, Publishers Protective Service, for the purpose of collecting accounts alleged to be delinquent, thereby representing and implying that said Publishers Protective Service is an independent and separate organization employed to collect accounts which are in arrears."

"In truth and in fact said fictitious collection agency is operated solely by respondent, John J. Crawley, and is used by respondents to coerce and intimidate purchasers of said course of instruction, *as well as persons who have cancelled orders therefor,* and compel them to pay for said course, though purchased as a result of the erroneous and mistaken belief engendered by respondents' deceptive practices as herein alleged."[1]

After formal hearings, the Examiner issued his initial decision containing findings, conclusions and an order on the limited matters alleged in Paragraph Seven of the complaint. The Commission on November 1, 1956, denied Petitioners' appeal and adopted the findings, conclusions and Order contained in the initial decision. The Order requires Petitioners and "their agents, representatives and employees, directly or through any corporate or other device" to cease and desist from: (1) Using fictitiously any trade or corporate name in collecting past-due accounts; and (2) Implying that such fictitious collection agency is an independent organization engaged in the business of collecting past-due accounts.

Thereafter Petitioners sought review before the United States Court of Appeals for the District of Columbia Circuit, upon various grounds, summarized

[1] Petitioners moved to dismiss this entire paragraph because of lack of evidence. Only the italicized portion was stricken, however.

as follows: Public interest was lacking; the Order is lacking in definiteness and specificity and, being too broad, is invalid; the findings and conclusions are not supported by substantial evidence; there is no duty on the part of collection agencies to disclose to the debtor any identity of ownership or control existing between the creditor and the collection agency. That Court on June 6, 1957 filed its brief opinion affirming the Order of the Commission.

No debtor or other member of the public appeared as a witness at the hearing. The entire evidence consisted only of five exhibits and the testimony of John J. Crawley, individual Petitioner herein. Two of the exhibits pertain to the registration of the trade name, "Publishers Protective Service," and the remaining three are samples of collection letters used by Petitioners.

Wm. H. Wise Company, Inc. and its wholly owned subsidiary, The Charming Woman, Inc., are engaged in the publishing business and are corporations organized under the laws of New York, with offices in New York City, the former at 50 West 47th Street and the latter at 37 West 47th Street. John J. Crawley owned *only* 6 or 7 of the 73,000 shares of the issued capital stock of Wm. H. Wise Company, Inc., and is President of both corporations.

Publishers Protective Service, an unincorporated company, is solely owned by John J. Crawley and has been since it was organized in December, 1935. It was registered on that date as a collection agency pursuant to the laws of New York and has been in that business ever since. Until the last few years it collected accounts for others, such as Doubleday, Book-of-

the-Month Club, Greystone Press, etc., but now, due to the volume of their business, collects only for the two corporate Petitioners.

The corporate Petitioners collect their accounts by mailing to their debtors a series of letters varying in friendliness, which the Commission found contained no harsh or threatening language. At the time this series of letters is mailed, it is not known whether a collection agency will be required. Should one be required, Publishers Protective Service is engaged for only 20 to 25% of the claims and other agencies for the remainder. Only 8 to 10% of the total business of both corporations is sent out for collection. No delinquent account is ever sold or transferred. Publishers Protective Service always encloses with its collection letters a copy of the original account showing the amount due and the name of the creditor.

No debtor objected to this method of collection. Indeed, the Commission specifically found that no debtor did anything he would not otherwise have done or legally be required to do, or was deprived of any defense and that the debts which Petitioners sought to collect were in fact lawful, just and demandable.

REASONS RELIED UPON FOR GRANTING THE WRIT

I

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, IN THE INSTANT CASE, IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE TENTH, SEVENTH, SIXTH, FOURTH, THIRD AND SECOND CIRCUITS ON THE SAME GENERAL MATTER OF FEDERAL LAW, AND ON THE SAME GENERAL FACTUAL SITUATION

The United States Court of Appeals, District of Columbia Circuit, in affirming, cited no opinion of any court nor the opinion of the Federal Trade Commission. No case has been called to Petitioners' attention which, because of the factual similarity, would serve as an elucidation of the Commission's conclusions. The Commission founded its opinion upon cases which are not in any manner factually similar to the instant matter. Those cases involved some element of fraud, entrapment, enticement, swindle, or the "skip-tracer" type of practice. Had the basic and concrete principles contained in the cases cited below been applied, the court would have concluded that (a) public interest is lacking, (b) there is no deception or misrepresentation, and (c) the Order is lacking in specificity and definiteness and, being too broad, is invalid.

Public Interest Is Lacking

The Commission does not have jurisdiction unless there is a *specific and substantial* public interest. This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived. *F.T.C.* v. *Klesner*, 280 U.S. 19, 50 S. Ct. 1, 74 L. Ed. 138 (1929), also *F.T.C.* v. *Royal Milling Co.*, 288 U.S.

212, 53 Sup. Ct. 335, 77 L. Ed. 706 (1933). Here there is no evidence that debtors were under misapprehension or confusion or even that they had been deceived. On the contrary, the Commission specifically found that the debts were lawful, just and demandable, and that the collection letters were friendly, containing no harsh or threatening language. These letters were mailed before Petitioners employed a collection agency. There is nothing wrong, immoral or deceptive in the content of these letters—even in those phrases to which the Commission objects, stating that the matter would be turned over to a "Collection agency" or an "outside department" which would be an "unpleasant experience". A creditor has the right to pursue vigorously his debtor so long as in the chase he practices no fraud or entrapment. Petitioners are not guilty of this or any other type of offensive conduct. The form or content of these letters may offend the Commission but that does not justify the issuance of the Order. There is no public interest in preventing trade practices which are merely offensive to a suitable standard of business morality. *F.T.C.* v. *Gratz*, 253 U.S. 421, 40 S. Ct. 572, 64 L. Ed. 993 (1920); *Butterick Publishing Co.* v. *F.T.C.*, 85 F. 2d 522 (2nd Cir. 1936) citing *Northam Warren* v. *F.T.C.*, 59 Fed. 2d 196. No debtor objected to this method of collection. On the contrary as stated above the debts were lawful, just and demandable and no debtor did anything he would not otherwise have done or legally be required to do, nor was he deprived of any defense. Public interest therefore is lacking because the natural and probable result of the challenged practice did not cause any debtor to do anything he would not otherwise have done. *Bockenstette* v. *F.T.C.*,

134 F. 2d 369, (10th Cir. 1943); *Pep Boys* v. *F.T.C.*, 122 F. 2d 158 (3rd Cir. 1941); *Bucksbaum and Co.* v. *F.T.C.*, 160 Fed. 2d 121 (7th Cir. 1947). Even on the theory that this is a controversy between a debtor and Petitioners as a creditor, public interest is still not evident because the Commission has no jurisdiction to regulate, settle or determine private rights. *F.T.C.* v. *Gratz*, supra; *Flynn and Emrich Co.* v. *F.T.C.*, 52 F. 2d 836 (4th Cir. 1931).

For the first time, the Commission asserts that Collection agencies, such as Publishers Protective Service, have a duty to disclose to debtors any indentity of ownership or control between the creditor and the collection agency, failure to do so being sufficient, in some mysterious way, to establish injury to the public generally, in spite of the fact that there was no evidence of injury to any debtor. This theory seems to be based upon the fact that a debtor upon receiving a letter from Publishers Protective Service has no way of knowing that John J. Crawley, its sole owner, is also President of the corporate Petitioners. This theory conflicts with the *Bockenstette* and *Pep Boys* cases, supra, because there is no evidence that any debtor having this information would do anything he would not otherwise have done or legally be required to do. Knowledge of the relationship existing between the creditor and the collection agency will not change the character of the debt, stifle competition or injure competitors. It can make no possible difference to the debtor whether he receives a letter from the creditor or the collection agency. If the debt is not owed, he may resist payment and raise all defenses available since he has been deprived of none, or since the debts were found to be legitimate he will pay the

debt. Publishers Protective Service always encloses with its collection letters a copy of the original statement of account, thus a debtor is always acquainted with the nature and amount of the debt and the name of the creditor. This is certainly not duplicitous conduct, but open, honest and fair.

Public interest is lacking and the opinion below conflicts with the rulings in other circuits upon the same point of law.

There Is No Deception or Misrepresentation

Paragraph Seven of the Complaint reads:

> "In the course and conduct of said business as aforesaid, respondents have adopted and use a fictitious trade name, to wit, Publishers Protective Service, for the purpose of collecting accounts alleged to be delinquent, thereby representing and implying that said Publishers Protective Service is an independent and separate organization employed to collect accounts which are in arrears.
>
> "In truth and in fact said fictitious collection agency is operated solely by respondent John J. Crawley, and is used by respondents to coerce and intimidate purchasers of said course of instruction * * * and compel them to pay for said course, though purchased as a result of the erroneous and mistaken belief engendered by respondents' deceptive practices as herein alleged."

The debts were not merely allegedly delinquent but were, as the Commission found, lawful, just and demandable. Nor is Publishers Protective Service a "fictitious collection agency" as alleged, but a bona fide one, separate and distinct from the other Petitioners. It was registered pursuant to law in New York City in 1935 as a collection agency and has been

such ever since, collecting for many publishers until the last 6 or 8 years, but since then only for the corporate Petitioners because of the volume of their business. It has a separate mailing address and is listed in the directories of the two buildings occupied by the two corporate Petitioners. It keeps separate records though they are serviced by employees of Wm. H. Wise Company, Inc. for reasons of efficiency. It is clear that Publishers Protective Service is independent and distinct from the other Petitioners and is not fictitious which is defined to mean "feigned, imaginary, not real, counterfeit, false, not genuine, non-existent". *Kropp Forge Company* v. *Employers Liability Association Co.*, 159 F. 2d 536 (7th Cir. 1947); Black's Law Dictionary, Fourth Edition, p. 751.

It is true that John J. Crawley solely owns and operates Publishers Protective Service and that it is registered in his name. This is not fraud, deception, misrepresentation or coercion because an individual may adopt a trade name for business purposes in the absence of fraud or prohibiting statute. *Kropp Forge Company* v. *Employers Liability Association Co.*, supra. The ownership and control of Publishers Protective Service is separate from the ownership and control of the two corporations. John J. Crawley owned *only* 7 of the 73,000 shares of Wm. H. Wise Company, Inc. and The Charming Woman, Inc. is owned wholly by Wm. H. Wise Company, Inc. Crawley is President of both corporations but as such does not control them since control is vested in the Board of Directors.

Therefore the complaint should have been dismissed because of failure of proof as required by Sec. 7(c) of the Administrative Procedure Act, 5 U.S.C. Sec.

1006(c). See also *F.T.C.* v. *Gratz,* supra; *Ohio Leather Co.* v. *F.T.C.,* 45 F. 2d 39 (6th Cir. 1930).

The Order Is Invalid

The Order is directed against Petitioners and their "agents, representatives and employees, directly or through any corporate or other device," and is in direct conflict with *R. J. Reynolds* v. *F.T.C.,* 92 F. 2d 535, 539 (7th Cir. 1951) wherein the words, "officers, agents, representatives and employees," were struck from a similar order. For these reasons, the Order is lacking in specificity and definiteness and, being too broad, is invalid and conflicts with a ruling on a similar order in the Seventh Circuit.

II

THE FEDERAL TRADE COMMISSION ACT DOES NOT AUTHORIZE THE FEDERAL TRADE COMMISSION TO REQUIRE THAT A COLLECTION AGENCY DISCLOSE TO A DEBTOR IDENTITY OF OWNERSHIP OR CONTROL, EITHER IN WHOLE OR IN PART, BETWEEN THE CREDITOR AND THE COLLECTION AGENCY

The essence of the Commission's holding is that Publishers Protective Service is not a bona fide independent collection agency, but a fictitious or make believe organization operating under the control of and for the benefit of other organizations with which the individual Petitioner, John J. Crawley, is associated. As hereinbefore more fully set forth, Publishers Protective Service is an independent organization separate from the corporate Petitioners and is not fictitious nor has it engaged in fraudulent, deceptive or sinister methods in its business.

For the first time the Commission is asserting that collection agencies, such as Publishers Protective Service, have a duty to disclose to debtors any identity of

ownership or control between the creditor and the collection agency, failure to do so being sufficient, in some mysterious way, to establish injury to the public generally, in spite of no evidence of injury to any debtor. (*Bucksbaum* v. *F.T.C.*, supra, requires showing of detriment to public interest.) This theory seems to be based upon the fact that a debtor upon receiving a letter from Publishers Protective Service has no way of knowing that John J. Crawley, its sole owner, is also President of the two corporations. Since there is no evidence that any debtor did anything he would not otherwise have done or legally be required to do, this theory is clearly in conflict with the rulings in *Pep Boys* and *Bockenstette*, supra. The public interest clause of Section 5 of the Federal Trade Commission Act does not permit the Commission to act as a clearing house to settle everyday private quarrels of business, *F.T.C.* v. *Gratz; Flynn and Emrich* v. *F.T.C.*, both supra; or to prevent trade practices which are merely offensive to a suitable standard of business morality, *F.T.C.* v. *Gratz; Butterick Publishing Co.* v. *F.T.C.*, both supra.

Petitioners seek to collect valid debts by legitimate methods which they have a right to do. There was no fraud, deception, misrepresentation or coercion either in the methods used or in the ownership or control of Petitioners. The public is not concerned whether a debtor is informed that a collection agency is owned or controlled by the same person who is president of the creditor. Failure to disclose this knowledge would not change the character of the debt, stifle competition or injure a competitor. Certainly it could make no possible difference to the debtor whether he received a letter from the creditor, from Publishers Protective Service or from another collection agency, because if he doesn't owe the debt, he will resist payment and if

he owes it, he will probably pay it. The Commission may carry its theory to absurdity, to cases where blood relatives are employed by the collection agency and the creditor, to an attorney who has a stock ownership in the creditor and represents the collection agency in a professional capacity. Degrees of relationship by consanguinity or marriage may also have to be disclosed to the debtor. It is impossible to comply in any practical way with the Order and still stay in business. Petitioners' dilemma is administratively imposed without substantial evidence, valid reasons or statutory authority. This is truly regulation running riot.

No reported opinion of any court, not even of the Commission, has gone so far as the Commission has in this case. Petitioners have been deprived of their rights and guarantees to due process of law under the Fifth Amendment to the Constitution of the United States.

III

THE ORDER DIRECTED AGAINST PETITIONERS AND THEIR AGENTS, REPRESENTATIVES AND EMPLOYEES, DIRECTLY OR THROUGH ANY CORPORATE OR OTHER DEVICE, IS LACKING IN SPECIFICITY, DEFINITENESS AND, BEING TOO BROAD, IS INVALID

The Order is directed against Petitioners and their "agents, representatives and employees directly or through any corporate or other device." In *R. J. Reynolds* v. *F.T.C.*, 92 F. 2d 535, 539 (7th Cir. 1951) the words, "officers, agents, representatives and employees" were struck from a similar order because as the court said:

> "We can see no logical basis for the indiscriminate inclusion, in an order directed against a corporation, of all persons connected with it, from the

President on down to the most humble employee. * * *"

* * * * *

"* * * In the instant case, not only was there a failure to name individual respondents, but there is no proof and no finding as to which of the 'officers, agents, representatives and employees' were responsible for the unlawful activities of the corporate respondents."

This opinion distinguished *F.T.C.* v. *Standard Education Society*, 302 U.S. 112, 58 S. Ct. 113, 82 L. Ed. 141, also relied upon here by the Commission, wherein individuals were named in the complaint and the corporation was formed to evade the order, therefore the order was not too broad. However, here the Order is much broader and there is no evidence that any individual or "corporate or other device" plans to evade the Order or plans to practice deception. As in *R. J. Reynolds* v. *F.T.C.*, supra, the agents, representatives, employees, corporation or "other device", alleged to be responsible for unlawful activities, are not named or described in the complaint or findings.

For these reasons the Order is lacking in specificity and definiteness and, being too broad, is invalid.

CONCLUSION

The opinion of the lower court affirming the Order of the Federal Trade Commission is clearly in conflict with the law as announced by this Court and the courts in the other circuits, particularly with reference to the fact that public interest is lacking and to the fact that the Order is invalid, being too broad and lacking in specificity and definiteness.

The Findings, Conclusions and Order are not supported by or based upon any substantial evidence and

the entering of the Order was an arbitrary and capricious action in deprivation of Petitioners' rights and guarantees to due process of law under the Fifth Amendment to the Constitution of the United States. Since the Commission has not sustained its burden of proof as required by Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Sec. 1006(c) the complaint should have been dismissed.

The Commission has exceeded its statutory authority in asserting a duty upon collection agencies to disclose to the debtors any identity of ownership or control existing between the creditor and the collection agency. No reported opinion of any court nor of the Federal Trade Commission has ever required this.

The Order directed against Petitioners and their "agents, representatives and employees, directly or through any *corporate or other device,*" is lacking in specificity and definiteness and, being too broad, is invalid.

It is submitted that a writ of certiorari should issue so that this Court may resolve this intolerable situation which so adversely affects without legal authority such a large and important segment of business, particularly since no member of the public, or the public as a whole, has been or could be injured by the action and methods used by Petitioners in collecting honest and valid debts owed to them.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,647

WM. H. WISE COMPANY, INC., a corporation *et al.*, *Petitioners*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition to Review an Order of the Federal Trade Commission

Decided June 6, 1957

Mr. Thomas B. Scott, with whom *Mr. Lawrence J. Simmons* was on the brief, for petitioners.

Mr. James E. Corkey, Attorney, Federal Trade Commission, with whom *Mr. Robert B. Dawkins,* Assistant General Counsel, Federal Trade Commission was on the brief, for respondent.

Before EDGERTON, *Chief Judge* and WILBUR K. MILLER and BASTIAN, *Circuit Judges.*

PER CURIAM: The Federal Trade Commission's order directs the petitioners to cease and desist from "1. Using fictitiously any trade or corporate name in collecting past-due accounts; 2. Implying that such fictitious collection agency is an independent organization engaged in the business of collecting past-due accounts." We find no error.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957

No. 13,647

WM. H. WISE COMPANY, INC., a corporation *et al.*, *Petitioners*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition to Review an Order of the Federal Trade Commission

Before: EDGERTON, *Chief Judge*, and WILBUR K. MILLER and BASTIAN, *Circuit Judges*.

Judgment

This case came on to be heard on the record from the Federal Trade Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the order of the Federal Trade Commission on review in this case be, and it is hereby affirmed.

Dated: June 6, 1957.

Per Curiam.